Central Law Journal.

ST. LOUIS, MO., NOVEMBER 21, 1919.

THE PROBLEM OF SOCIAL UNREST—II—THE HIGH COST OF LIVING.

It would be foolish, in so short a discussion as this must be, to analyze all the economic factors that enter into the calculation called the cost of living. We have no purpose, at this time, to discuss the theory of supply and demand. If, however, there is any unnecessary and artificial interference with either the supply or the demand, we are under obligation to look for and remove it.

In the first place, if it be a fact that there has been any great or unavoidable reduction in the world's supply of any necessary commodity or any unusual demand therefor, time will soon readjust the equilibrium that must necessarily exist between supply and demand. In the meantime it is the duty of the loyal citizen to conserve the present supply as much as possible. Nor can it be doubted that Congress has power in any great public emergency to control the distribution of any necessary commodity, such as coal, wheat, sugar, etc., in order that such distribution shall be as equitable as may be possible. The assertion of such a power during the war does not mean that Congress would not have such a power except in time of war.

The right to fix prices may be as necessary as the right to supervise the distribution of a necessary commodity. But only a great national emergency, it seems to us, would justify such an interference with the right of contract. Every man has the right to sell his property for as much as he can get and to buy as cheaply as possible, except where the life of the people is at stake. In such cases it is hardly debatable that the government could take over the business of any industry and so regulate prices as to avert a national calamity. So there can be no doubt that, if necessary, the government could control the railroads, operate coal mines or regulate the manufacture and distribution of flour, sugar, etc. It is important to realize that the more complex is the organization of society the more dependent are the individual citizens upon each other's labor and property. For this reason there is bound to be an extension of the police power to meet the exigencies created by a situation unknown to the period of the early common law.

Moreover, there is likely to be legislation defining and punishing the new offense of profiteering. At common law it was expected that a man would make all the profit he could in his business. But changed conditions must necessarily change the law. "But," it is asked, "may not a man do what he will with his own?" No, not when society is depending on his labor or his products to exist. That is the worst heresy that ever received a respectable following among civilized men. Have all the coal operators a right to refuse to mine their coal? Have all the farmers a right to destroy their wheat? Have all the railroads a right to suspend operations?

The idea that a man may do what he will with his own is an idea that grew up in an age when every man lived unto himself. Such an individualistic conception of rights in property can find no acceptance in an age when men live in a state of absolute dependence upon one another.

The first important step to a solution of the high cost of living problem is a recognition of the principle that every owner of property is, in a very real sense, a trustee for the public good. While the law recognizes the proprietary rights of the individual, these rights are limited by the superior rights of society itself. *Salus*

populi suprema lex est. And as society becomes more complex in its organization, the proprietary rights of the owner become more and more circumscribed.

This principle should be particularly emphasized with respect to those commodities which are necessary to the life of the nation. Under the General Welfare Clause of the Constitution, as well as the Commerce Clause, it seems to us that Congress has ample authority to create and constitute a board to control all industries, vital to the public welfare, operating in interstate commerce. The railroads, the coal mines, the packing plants, the steel foundries, the flour mills and the sugar industry are instances of those lines of business wherein any artificial interference with production, whether by capital or by labor, threatens the very existence of the nation. It is ridiculous to argue that the people have no right in such industries and that they must submit to any alleged private authority over them which necessarily draws with it the power of life and death over the people.

The separation of these essential industries from the general mass rests upon very clear distinctions. They might well be termed ***quasi*** public industries. Moreover, such a segregation tends to clear the subject from the confusion of thought that results from a suggestion of governmental control of all business—a thing practically impossible, unnecessary and dangerous. It is not vital to the public interest what the dealers in diamonds do with their commodity, or what the publisher charges for the latest novel, or whether the actors tie up all the theaters by a general strike. Theoretically, it is true, the principle applies to all business, but its observance is not so vital to the life and existence of the community as in respect of those industries which we have called *quasi* public industries.

Another important factor in this problem is the absolute necessity of preventing any interference with production. The National Chamber of Commerce is doing a wise thing in making a strong appeal at this time for greater production. There can be no doubt that the man who can make two blades of grass grow where one grew before is a public benefactor, especially in a time like this. Therefore lawyers should join heartily in urging that every idle factory shall start going, that every idle acre shall be planted, and that every idle man shall find a productive job.

On the other hand, any restriction upon production by the producer or any combination of producers, whether coal operators or cotton planters, should be made an offense against society. Those who deliberately enter into an agreement to limit production in any essential commodity in order to increase their own profits may properly be regarded, in this age, as enemies of mankind.

Moreover, labor, as well as capital, is subject to this principle. They also are trustees to society of the labor that enters into any commodity, and society is entitled to a reasonable day's work from every man. Any organization which seeks to limit the hours of labor unreasonably is as much the enemy of society as is the capitalist who closes his mill in the face of a public demand for his commodity. Public opinion has supported the appeal of the labor unions for an eight-hour day. The public is in sympathy with the demand for better labor conditions and higher wages. These things are all necessary to equalize living conditions and enable every man to share fairly in the country's prosperity. But when unions demand a full day's pay for six hours' work, except under conditions where longer hours are injurious to health, they are cheating society of their labor and are limiting production. The eight-hour day has been accepted as a proper standard of service in any line of business: more than this is unfair to labor; less than this is unfair to the people. Society cannot be expected to continue its favor to an organ-

ization which selfishly demands the right to refuse to do its share of work and to throw the burden of production upon others. And when an organization attempts to force society to meet such demands it will soon discover that what was once an association whose purposes were approved by the courts and the people, will become a conspiracy which the law will condemn and which the government will strike down to save its own life.

In time of peace, as in time of war, society demands that every man shall be a producer. The law should recognize this vital factor in the life of society and should be quick to declare illegal any act or compact which, in any measure, seeks to limit the production of any of the necessaries of life.

NOTES OF IMPORTANT DECISIONS.

DEPORTATION OF ALIENS WHO ADVOCATE THE OVERTHROW OF GOVERNMENT BY FORCE.—No movement has received such enthusiastic approval on the part of the people as the present round-up of foreign radicals and their deportation under the Immigration Act of February 5, 1917, 39 Stat. 834. Section 19 of this act provides for the arrest and deportation within five years after entry of any alien who at the time of entry was a member of one or more of the classes excluded by law. It then provides for the deportation of classes of aliens therein mentioned, irrespective of the time of their entry into the United States, and among those so specified is the following:

"Any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the government of the United States or all forms of law or the assassination of public officials."

An interesting evidence of the favorable construction of this act on the part of the courts is shown by the recent case of Lopez v. Howe, 259 Fed. 401. In this case a decree of deportation had been rendered against Frank R. Lopez, who came to this country from Spain fifteen years ago, but was never naturalized.

Lopez claims to be a "philosophical" anarchist. For which reason he claimed the lower court could not deport him under the act. He declared that he was opposed to murder or assassination. "Everyone has a right to live," he declared on his examination. He, however, admitted that he was an anarchist, but a "peaceable" one. The Court of Appeals (2nd Cir.), however, does not believe in "peaceable" anarchists, for it has the following to say on this point:

"A great deal was said at the argument of the distinction between philosophical anarchists and anarchist communists. The two represent very different schools of thought. There is a class of honest and law-abiding visionaries, who are convinced that the interest of society would be promoted by the abolition of all government whatsoever. Their propaganda is purely educational in character, and violence does not enter into it. They do not believe in force, or in war, or in the taking of human life. The relator evidently belongs to that class. But while the student of social science may discriminate between philosophical anarchists and other kinds of anarchists, the act of Congress now under consideration does not; and no such discrimination is necessary, for the constitutional power to exclude or to deport does not depend upon whether the alien is or is not a criminal, or the advocate of lawless ideas."

Lopez claimed that being a "philosophical" anarchist, his case came within the five-year limit, and since he had been here longer than that, he was not liable to deportation. On this point the court said:

"Because he is a philosophical anarchist, and is opposed to the overthrow of government by force or violence, the relator claims he is not within the provisions of section 19 of the act of Congress, except in the 5-year class, and that, as he has been in this country for 15 years, he cannot be deported. From what has been said in an earlier part of this opinion, it appears that the relator's understanding of the statute differs from the understanding of this court. That section deals with a number of different classes of aliens, and provides that certain classes may be deported at any time within 5 years after entry, but does not so limit the time of deportation as respects certain other classes, as to whom it is declared they may be deported, irrespective of the time of their entry into the United States. An alien at the time of his entry may not be an anarchist, and therefore may be entitled to enter. But if, at any time after his entry, he is found 'advocating or teaching anarchy,' he may be deported. The relator's testimony, only a portion of which has been quoted, shows conclusively that he is an advocate and a teacher of anarchy, making speeches in its favor, organizing anarchist groups, and distributing anarchist literature. As he reads and writes Spanish, Italian, Portuguese, and English, he is a man of ability, who naturally has influence with his associates. That he is liable under the law to deportation admits of no doubt."

See also recent case of Ex Parte Pettine, 259 Fed. 733, which announces the same rule. See also 194 U. S. 279, 24 Sup. Ct. Rep. 719.

THE CONGRESS AND TREATIES.

On August 2, 1919, in the House of Representatives, Congressman Geo. M. Young declared the Canadian Reciprocity Act illegal since: (a) The power of the President to negotiate with foreign governments does not extend outside the treaty-making power; (b) this power does not extend to revenue measures, whose origination belongs solely to the House; (c) Taft's action was, therefore, an invasion of the House's constitutional prerogatives. In other words, the approval of the House was of no effect, since the President and the Senate had, in the first place, no right to negotiate and ratify such a treaty. It is well known that in the past the President has been obliged to keep in touch with the House Committee on Foreign Relations; and where an appropriation has been necessary it has been customary to ask the concurrence of the House.[1] There have been, recently, many claims in the press and in Congress, both House and Senate, that the Peace Treaty, especially the League of Nations, is unconstitutional, since it deals with the power to declare war and to regulate the size of our military establishment, matters left under the Constitution to Congress.

Subjects Included in Treaty Power.—Jefferson at one time believed that the Constitution only meant to authorize the President and Senate to carry into effect, by way of treaty, *any power they might constitutionally exercise.*[2] He expressed doubts, however, as to the soundness of his view. Murray, Chief Justice, in a California case, said:[3] "In my opinion, the treaty-making power can only be coeval with the express grant of power to the Federal Government, and can never be extended, by implication * * * to matters which are the proper subject of congressional legislation." Under this view treaties concerning tariff duties, agreements to pay money, etc., could never constitutionally be negotiated. In Jefferson's Manual[4] it is declared that the treaty-making power in the Constitution "must have meant to except * * * those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others."

This narrow view of the power of the President and Senate to make treaties is not the prevailing opinion. Thus, Senator Kellogg, a leading authority on the treaty power says[5] that the treaty-making power in practice and authority has been held "to embrace all those subjects which it has been the practice and customs of nations to exercise." This includes the questions of customs duties, settlement and payment of damages, etc. Any of the specific grants made to Congress may be made the subject of treaties. Said Chief Justice Ellsworth in a letter of March 13, 1796: "The power goes to all kinds of treaties." And Butler, a leading authority, declares:[6] "The power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign states, is practically unlimited." This power is limited, and limited only, by the express provisions of our Constitution; for instance, no power of Congress given it under the Constitution can be annulled or amended.[7] Treaties and laws of Congress are of equal supremacy, and it is well settled that the latest treaty or act relating to a given subject is supreme.

The objections that are made to the League of Nations on the ground of Constitutional infringement and that are made to the Reciprocity Act are not new. The

(1) Young, New American Government, 25.

(2) IV—Jefferson's Correspondence, 498, Story on the Constitution, § 1508, asks if this would mean that appointments could be made by treaty.

(3) Siemssen v. Bofer, 6 Cal. 250.

(4) New York, 1876, p. 110.

(5) Speech in the Senate, August 7, 1919.

(6) The Treaty-Making Power, § 3.

(7) Thomas v. Gay (1897), 169 U. S. 264.

same objections were made to the Jay Treaty of 1794—that it restricted the power of Congress to lay taxes or exact higher duties upon commodities, and that it provided for the payment of money. In the bitter discussion that arose over that treaty, Hamilton, one of its leading supporters, said that treaties may include the consideration of pecuniary indemnifications, involving appropriations of money. President Washington, taking the advice of Hamilton and others, refused to submit the treaty to the House.[8] Although the power to originate revenue bills is vested exclusively in the House, many treaties involving modification of the existing revenue laws have been negotiated, and Congress asked to pass the necessary legislation to carry them into operation. Senator Kellogg asserts that although the power to negotiate such treaties is beyond question, the wisdom is doubtful. In the case of De Lima v. Bidwell,[9] the decision of the court asserted that, in effect, the treaty of April 11, 1899, amounted to a repeal of the tariff laws. Mr. Justice White and three other judges dissented, on the ground that it was not good policy for the government to make a treaty affecting duties, since the responsibility for raising revenue belongs to Congress. The court, however, held that the question of propriety was for the Senate and the President to determine when they made the treaty.[10] The De Lima case has since been cited and approved.[11]

Necessity of Auxiliary Legislation.—The President and Senate may negotiate and ratify a treaty reducing tariff duties or appropriating money. Can the treaty so alter existing laws that no further legislation is necessary? Would a lower tariff rate, for instance, immediately become operative? If so, Congress would obviously be deprived of powers delegated to it by the Constitution. "A treaty would be a mere nullity which should attempt to deprive Congress * * * of any general powers which are granted (to it) by the Constitution."[12]

John Forsyth, Representative, later Secretary of State, instituted in the House, during the discussion of the Jay Treaty, the contention that legislation to administer the treaty was necessary, but made no claim that the treaty was invalid. It was a valid treaty, "but not having the force of law in its operation upon the municipal concerns of this people without legislative enactment." Mr. Cyrus King, of Massachusetts, in the House, after the negotiation of the commercial treaty of 1815 with Great Britain, said:[13] "The result of my investigation on this subject is: that whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested by the Constitution in the Congress of the United States * * * after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress." That is, treaties increasing or diminishing duties on imports do not become operative until and unless Congress sees fit to change the existing law to correspond with the treaty provision. Mr. King adopts Forsyth's view when he says: "Such provisions of such treaty must receive the sanction of Congress before they can be considered as obligatory and as part of the municipal law of this country." And a late authority says: "The courts have decided that treaties which require such legislation remain inoperative until the statutes have been enacted."[14] Among the eighteen enumerated powers given to Congress by the Constitution are the powers to lay and collect taxes, to regulate commerce with foreign nations, to raise and support armies, to provide and maintain a navy. Not

(8) A list of treaties (1796-1903) involving the payment of money and not submitted to the Congress may be found in Crandall on Treaties, 179.

(9) 182 U. S. 1 (1901).

(10) This would seem to be but a logical application of the principle advanced in Luther v. Borden, 7 How. 1 (1845).

(11) Dorr v. United States (1903), 195 U. S. 138.

(12) Pomeroy, Constitutional Law, 567.

(13) Annals of Congress, 1815-1816, pp. 538, 539.

(14) Butler, Treaty-Making Power, § 363.

only is Congress given power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," but it is given the right to make laws to carry into effect "all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." It is certainly difficult to see how the treaty power can be construed as being able to take away from Congress the law-making power specifically granted it.

This is the position taken by the courts. Thus, in Foster v. Neilson the court said that "while a treaty is the supreme law of the land and operates as such in all matters not requiring legislative action, yet when made dependent on legislative action it does not take effect until such action is had."[15] In the case of Turner v. American Baptist Missionary Union,[16] Mr. Justice McLean, on the circuit, said: "A treaty under the Federal Constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be the supreme law of the land where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the Constitution to make it such."

Within the past few weeks the author has heard two specialists in the field of international law declare that immediately upon the ratification of tariff agreement by treaty with a foreign country the new rates would go into effect, and that such has been the past practice. This is not, however, the case. Thus, Butler declares:[17] "If the treaty provides for the modification of existing legislation, as, for instance, a different tariff rate, the treaty will not go into effect in that respect unless Congress enacts new legislation, or modifies existing legislation, in accordance with the treaty provisions." January 31, 1902, Mr. Dalzell, of Pennsylvania, in the House, said he knew of no instances "when there has been a change in the tariff laws through the operation of a treaty without the concurrence of the House of Representatives."[18] The treaty of peace, with Spain in 1898, considered in De Lima v. Bidwell, previously referred to, was held to abolish duties on goods from Porto Rico, since upon the exchange of ratifications that island ceased to be a "foreign country" within the meaning of the tariff laws. So this is no instance of an exception to the above-stated rule. The treaty did not change or make a law regulating duties; the law imposing duties on goods from "foreign countries" still stood, the Supreme Court simply declaring the fact that Porto Rico was no longer a "foreign" country.

The necessity for Congressional legislation has been expressly recognized, there being several instances of appropriations being secured before treaties were fully negotiated, thus assuring the foreign countries the treaty when ratified would be in effect.[19]

It is not a valid objection to say that the necessity of Congressional legislation imposes too great an inconvenience in the making of treaties. "As the negotiations are carried on by the executive alone, the subjecting to the ratification of the Representatives of such articles as are within their participation, is no more inconvenient than to the Senate."[20]

(15) 2 Peters 253 (1829).

(16) Federal Cases, No. 14251 (1852).

(17) Treaty-Making Power, § 313.

(18) For similar statements see: Crandall on Treaties, 95; Black on Constitutional Law, § 76; Stockton, Outlines of International Law, § 118.

(19) Tucker, Limitations on the Treaty-Making Power, 222-223; Crandall on Treaties, 135.

(20) Jefferson's Manual (New York, 1876), 110.

No Legal Obligation on Congress.—We have just seen that treaties concerning powers granted to Congress do not go into effect until the necessary legislation is enacted by the legislative department. Is Congress obligated in any way to enact statutes which will carry into effect the provisions of the treaty?

"While the treaty-making power of the United States is undoubtedly vested in the executive, subject to ratification by two-thirds of the Senate, it is still within the power of Congress * * * to control the ultimate effect of all treaty stipulations which in any way conflict with any existing laws of the United States, or which require legislation to make them effectual, or which require the appropriation of money to fulfill them. This can be done * * * by refusing to enact the legislation necessary to carry them out."[21] Tucker concludes a lengthy historical review by saying:[22] "We have shown, from the messages of the Presidents that every President from John Adams to McKinley has *sent to the House*, as well as to the Senate, one or more messages calling attention to the necessity of legislation by Congress to carry out the provisions of some treaty, either by appropriating money, or by changing some revenue law. * * * Does it not constitute the strongest possible refutation of the claim that a treaty can override a co-ordinate branch of the government, to which is committed, under the Constitution, the exclusive power of appropriation, the regulation of commerce, and the power of taxation?"

This constituted a recognition by the Executive of the legal necessity of Congressional action to make treaties touching powers delegated by the Constitution to the House effective. It was an admission that no department of the government has a right to intrude upon the rights of another department.

(21) Butler on the Treaty-Making Power, § 311.

(22) Limitations on the Treaty-Making Power, 232.

Blaine, as the result of a long experience, declared:[23] "The House would not now in any case consider itself under a constitutional obligation to appropriate money in support of a treaty, the provisions of which it did not approve. It is therefore practically true that all such treaties must pass under the judgment of the House as well as under that of the Senate and the President." This has been steadfastly insisted upon by the House, and in practice has been admitted by the President and Senate. Thus, at the time of the Alaska Purchase the Senate admitted that under some circumstances treaty stipulations "cannot be carried into full force and effect except by legislation to which the consent of both houses of Congress is necessary." In the De Lima case the court said that the Congress clearly reserves the right to refuse to carry out treaties involving the exercise of some of its constitutional powers. The House has insisted upon this right; but it has never, exercising its own discretion, refused to pass measures to carry out the provisions of a treaty. That this is their legal and constitutional privilege should not, however, be forgotten, especially at this time, when congressional obligations under the League of Nations are being discussed. The treaty-making power cannot itself appropriate money, change tariff duties, or declare that in certain circumstances this nation will be in a state of war; and there is no legal method by which Congress can be coerced into the performance of such treaty stipulations and be compelled to surrender powers granted it specifically by the Constitution.[24]

President Wilson admitted the right and power of Congress when he said in his prepared address to the Senate Foreign Relations Committee that "each government is free to reject it if it pleases," referring to the advice which the Council of the League of Nations is empowered to give as

(23) II—Twenty Years in Congress, 337, 338.

(24) I—Willoughby on the Constitution, § 206; Black on Constitutional Law, § 76.

the means of carrying out the obligations of Article X. He then declared: "Nothing could have been made more clear to the conference than the right of our Congress under our Constitution to exercise its independent judgment in all matters of peace and war. No attempt was made to question or limit that right." To limit this right would simply give to one department, the treaty-making, the power to destroy powers and functions of equal dignity and necessity, secured with equal sanctity by our Constitution.

Is Congress Morally Obligated?—Certain kinds of treaties require congressional legislation before they become effective, and Congress, in the exercise of its constitutional privileges, may use its discretion, and can in no way be compelled to pass the needed statutes or make the stipulated appropriations. There is absolutely no question that this is so as far as the municipal law of the United States is concerned. But treaties also affect our relations with foreign countries. Although not legally bound to carry out the provisions of a treaty may there be a moral obligation upon Congress to do so?

Hershey informs us that a state's capacity to contract (by treaty) may be limited in certain respects by its written constitution. "Whether the Treaty-making Power of the United States is thus limited is a controverted question.[25] This question is simply whether the Congress has *unlimited* discretion to grant or withhold appropriations, make tariff duties, etc., or whether this discretion is limited by the power given the President and Senate to make and ratify treaties. Or, to put it in another way, is this treaty power limited by the powers given Congress to grant appropriations, regulate foreign commerce, lay and collect taxes, and the other enumerated powers?[26]

A. *Affirmative.*—"It is the duty of Congress to give effect to the treaty by voting the necessary supplies" (in case of appropriation measures).[27] Von Holst declares unequivocally:[28] "Congress may be bound by a treaty not to exercise in a certain way a power belonging to it, although it might exercise it in that way if not bound by the treaty." Yet, as will be pointed out later, other statements by this author could logically point to a very different conclusion. Chancellor Kent refers to "the binding and conclusive efficacy of every treaty made by the President and Senate."[29] And President Wilson after discussing our obligations "to respect and preserve * * * the territorial integrity and existing political independence of all members of the league" says "that engagement constitutes a very grave and solemn moral obligation."

Why is it declared that Congress is bound to exercise its discretion (a new meaning would be given the word) in a certain way because of treaty stipulations? President Wilson declares he was very careful to point out to his colleagues at the Peace Conference that the United States could not be legally bound by the provisions of Article X, with the implied conclusion that they would have no international claim against us if we refused to act as they might believe in a certain instance to be our duty. But the international and constitutional law authorities who take the position that Congress is morally bound to carry out the provisions of a treaty, even though believing them unwise, do not take this view, but declare that the United States would be bound *internationally,* even though not bound in *municipal* law. Wheaton says:[30] "A treaty may bind internationally when it would not bind municipally." Says Dana:[31]

(25) Essentials of International Public Law, 312n.

(26) Butler on the Treaty-Making Power, § 298, says that "the great moral question still remains undecided as to how far the House of Representatives is bound, as a matter of good faith," to carry out the provisions of treaties concerning the granted powers. See also Crandall on Treaties, 178.

(27) Black on Constitutional Law, § 76.

(28) Constitutional Law of the United States, 303.

(29) Lecture XIII, p. 286.

(30) See in Wharton's International Law Digest, §§ 9, 318.

(31) Dana's Wheaton, § 543, n. 250.

"If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation, and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation." A more recent authority declares:[32] "The treaty-making power is able to obligate the United States internationally to the payment of sums of money."

Since the United States is internationlly bound it is the duty of Congress to pass the necessary laws, for to do otherwise would not only amount to a breach of the treaty but might jeopardize the credit of the nation. But since a breach of the treaty would result the consequences, the upholders of this view maintain, might be much more serious than an impairment of the country's credit. Thus, Butler says that although some treaties cannot be enforced in the United States yet foreign nations would have a claim, "and their claims can then be settled according to the rules of international law"; by diplomacy, arbitration, or war.[33] An earlier writer, Duer, declares:[34] "If a treaty require the payment of money to carry it into effect, and the money can only be raised or appropriated by an act of the legislature, the existence of the treaty renders it morally obligatory on Congress to pass the requisite law, and its refusal to do so would amount to a breach of the public faith, and afford just cause of war."

B. *Negative.*—With the view that Congress is morally bound to surrender its discretion to the stipulations or engagements made by the treaty power the present author disagrees. Some of the advocates of the above position are consistent, as Von Holst, when he declares that Congress is morally bound, surrendering its power of discretion, which it might choose to exercise differently, "if not bound by the treaty." But the President declares in one sentence that under Article X Congress retains its "independent judgment," and then declares that there is "a very grave and solemn moral obligation" upon Congress to act as provided in the treaty. "But it is a moral, not a legal obligation, and leaves our Congress absolutely free to put its own interpretation upon it in all cases that call for action." It is not true! Does this mean that if we are bound morally, in conscience, that we are still free to do as we will, as if this moral obligation did not exist? As Dean Tucker properly says in the Central Law Journal of August 1: "To be morally bound is as effective as is being legally bound." B, for instance, likes and desires to gamble; he is persuaded that gambling is morally wrong; he therefore ceases to gamble. But if he did not believe that the practice was morally bad he would still gamble; he curbs his natural desires because of this moral duty. A moral obligation may be, with people of fine instincts and feelings, even more pressing than a legal. No, Congress does *not* retain its power of independent judgment (the power to pass or reject as it believes for the best interest of the nation) if there lies upon it "a very grave and solemn moral obligation."

"A treaty would be a mere nullity which should attempt to deprive Congress * * * of any general powers which are granted (to it) by the Constitution."[12] We find Judge Daniels, therefore, saying in the License Cases that to be valid treaties "must be within the legitimate powers vested by the Constitution" in the Treaty Power.[35] And in Geofroy v. Riggs[36] Mr. Justice Field says: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself * * * It would not be contended that it extends so far as to authorize what

(32) I—Willoughby on the Constitution, § 206.
(33) Butler, Treaty-Making Power, § 315.
(34) Constitutional Jurisprudence, p. 138.
(35) 5 Howard 613 (1847).
(36) 133 U. S. 258 (1890).

the Constitution forbids." This, of course, may be either an express refusal of rights, or an implied refusal by the unreserved grant of some power to another department. "The Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other."[37] This was recognized in 1844 in a report submitted from the Committee on Foreign Relations to the Senate by Mr. Rufus Choate,[38] declaring that the legislative is the department of government by which commerce should be regulated, and notwithstanding the constitutional provisions as to the treaty-making power, the legislative will is paramount to the Executive in regard to all matters relating to commerce and revenue. That is, the power to make treaties cannot do that which is unauthorized or forbidden by the Constitution to be done.

"It is certain that no authority granted by the Constitution to any of the factors of government can be withdrawn from it by treaty."[39] As we have seen, however, Von Holst declares that Congress might be compelled to surrender its power of discretion, which would certainly seem to be a withdrawal by treaty of authority granted by the Constitution. Has Congress the power to appropriate money or has it not? If the action of the Treaty Power can obligate Congress to act in a certain manner, regardless of its own beliefs as to what is for the best interest of America, it is folly to say that the unimpaired power still remains in Congress. The question then is whether the Constitution intended to limit the granted power. We seem to have a prophecy of recent controversy in this statement of Mr. King in 1815:[12] "I never will consent that the House of Representatives of the people shall become a mere Parliament of Paris, to register the edicts of the President."

Authorities upon international law also inform us that a state cannot exceed its constitution, and is bound thereby, in making treaties. Vattel declares:[40] "It is from the fundamental laws of each state that we must learn where resides the authority that is capable of contracting with validity in the name of the state." Dr. Hershey says:[41] "The capacity of a state to contract may also be limited in certain respects by its written constitution."

Nations, therefore, dealing with the treaty-making power are presumed to have knowledge of the constitutional limitations; to know that Congress alone can declare war, or change tariff duties, or make appropriations, regardless of what treaties may contain. A treaty will not be valid, in effect, until the assent of the department in which the subjects it proposes are lodged is obtained. "This principle applies to all governments and is recognized by all European Powers."[42] If this is true then there could be certainly no moral obligation on Congress, since we could not be internationally bound by the act of the treaty-making power, until the former acted. "The United States is presumed to know the Constitution of the countries with which it proposes to enter into treaties. Those countries are presumed to know the constitution of the United States."[43] This

(37) Mr. Marcy in 1854; V—Moore's Digest, § 736.

(38) Senate Journal, 28th Congress, First Session, 1843-1844, pp. 445 ff. Von Holst, Constitutional Law of the United States, 202, states that the treaty-power "exists only under the Constitution."

(39) Von Holst, Constitutional Law of the United States, 303.

(40) Book II, Ch. 12, p. 193.

(41) Essentials of International Public Law, 312n.

(42) Tucker, Limitations on the Treaty-Making Power, 113.

(43) Ibid, 115. The Belgian Constitution, for instance, provides: "Treaties of commerce," among others, "shall go into effect only after having received the assent of the Houses." The Imperial German Constitution said: "So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by imperial legislation, the consent of the Federal Council shall be required for their conclusion, and the approval of the Diet shall be necessary to render them valid." Notice the fact that a treaty might be concluded, without being valid. The Constitution of France also required in certain cases the assent of the two Chambers before treaties could be regarded as complete and valid.

is by no means a new doctrine, having been clearly enunciated by King in 1815:[13] "Nor, sir, can any serious inconvenience arise from this construction. As to negotiations with foreign powers, our ministers will always know the peculiar structure of our government; nor can foreign ministers, who may ever be sent to treat with us, be ignorant thereof." If they have this knowledge they have notice of the limitations on the treaty power and could not in conscience hold other departments bound by stipulations touching powers granted thereto.

J. Randolph Tucker, Chairman of the Judiciary Committee of the House, on March 3, 1887, submitted a report, Number 4177, on the Hawaiian Treaty, in the course of which we read: "But it is said that foreign nations know nothing of the constitutional distribution of political powers, and that the treaty, so called, must in good faith be held supreme, despite a lack of what the Constitution may seem to require for its completeness. But this position is unsound. The maxim *qui cum alio contrahit, vel est, vel debit ease non ignarus conditionis ejus* (He who contracts with anyone, is not, or ought not to be, ignorant of the conditions thereof) is conclusive upon the foreign nation. That nation has no right to hold us bound by a paper not executed according to our Constitution. That nation need not be deceived. Willful blindness to a fact or negligence in taking note of what is within reach of inquiry is notice in law." Our Constitution clearly and specifically grants to Congress certain powers; it cannot be claimed that knowledge of such grant is not "within reach of inquiry." In Turner v. American Baptist Missionary Union[16] the court declared: "The representatives exercise their own judgment in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign country may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required."

Halleck writes:[44] "The question has sometimes been discussed, whether a treaty, duly ratified, is obligatory upon the contracting parties, independent of the auxiliary legislation necessary to carry it into complete effect. This will depend, in a measure, upon the limitations upon the treaty-making power expressed in the Constitution, or fundamental laws of the state. A general power to make and ratify treaties, necessarily implies the power to determine the terms upon which they shall be made; but the municipal constitution of a state may have limited this power * * * This limitation, when not expressed in the fundamental laws of the state, is sometimes necessarily implied in the distribution of power to its constitutional authorities. Commercial treaties * * * may require the sanction of the legislative power in each state for their execution. In such cases it is usual to stipulate in the treaty, that it shall not be binding till the proper laws are passed for carrying it into effect." These limitations, then, may be express or implied.

There is absolutely no question as to the right of the Senate to refuse to ratify treaties negotiated by the President, and in case of such refusal there exists no obligation on the United States in international law, or any stain upon its honor.[45]

It is evident therefore that foreign nations are required to examine our Constitution far enough to ascertain the part of the Senate in the making of treaties. And

(44) International Law, 191. On the following page he says that in the United States if Congress is to consider appropriations provided for in a treaty "as amounting to ordinary legislation" it would "make that body a branch of the treaty-making power." Is it not equally true that if Congress is to surrender its discretionary power to grant appropriations the Treaty-Power becomes a branch of the law-making power?

(45) Hall, Outlines of International Law (1915), § 66; Hershey, Essentials of International Public Law, 315n.

this although "the treaty-making power of a state is generally vested in its ruler."[46] Is it not logical to ask, then, that they examine our organic law far enough to see if the treaty power can negotiate certain kinds of treaties, or if the matters involved are specifically delegated to some other department of our government?

We have observed that at different times Congress has made appropriations before a treaty was made, evidently to assure foreign nations that the treaty would be finally put into effect. "Not only has the House uniformly insisted upon, but the Senate has acquiesced in their execution by Congress (referring to the effect of treaty stipulations entered into by the President and Senate); that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation is expressly made dependent upon the action of Congress."[47] And as mentioned previously President Wilson says he stated clearly the right of "our Congress under our Constitution to exercise its independent judgment in all matters of peace and war. No attempt was made to question or limit that right." So the representatives at the Peace Conference were made clearly aware and did not deny that Congress, even if Article X is adopted, will be able to "exercise its independent judgment" (although President Wilson later made a few unfortunate remarks as to "solemn moral obligations"). Discussing the Constitution of France, which provides that in certain cases treaties require the assent of the two Chambers before becoming complete and valid, Professor Burgess declares:[48] "If the foreign state should conclude with the President any agreement touching any of these subjects without the ratification of the legislature duly given thereto, France would not be bound by any principle of international law to fulfill the same. The foreign state, in dealing with the French President, is bound to know the extent of his power as provided in the Constitution." And foreign states are presumed to know in dealing with the American President that the Senate must ratify; they must examine the Constitution far enough to ascertain that fact; is it unreasonable to ask that they also know, for instance, that the power of originating revenue measures belongs to the House alone? Mr. Dallas declares that it is "now understood to be settled English law and practice" that "if a treaty depends for the execution of any of its stipulations upon a legislative act, the House could and should determine the expediency of carrying it into effect or letting it abort."[49]

The principle, then, that foreign nations should know the limitations in national constitutions upon the treaty-making power, limitations express or implied, is not new. What does our Constitution clearly provide? (1) The President is given power "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur"; (2) seventeen specific grants of power to the Congress are enumerated; (3) that body is given power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (would this not include the treaty-power?); (4) the Constitution and laws made in pursuance thereof "and all treaties made, or which shall be made, under the authority of the United States" constitute the supreme law of the land. It does *not* say "all treaties made by the President and Senate," but all made "under the authority of the United States." In yet another place we find reference to "this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority"—that is, under the authority of the Constitution *and* the "laws

(46) Hall, Outlines (1915), § 66.

(47) Crandall on Treaties, 195.

(48) II—Political Science and Constitutional Law, 294.

(49) II—Dallas's Letters from London, 209.

of the United States"; and the power to make such "laws of the United States" is given to the Congress. Treaties before they go into effect must have the sanction of law necessary.

One department of the Government has no legal or moral right to exercise powers granted to it in such a way as to destroy powers granted in the same Constitution to other departments. Yet if we adopt the narrow view that Congress is obligated to surrender its discretion when treaties are made dealing with its specific grants the legislative power will inevitably be destroyed to that extent. Gallatin, in a speech in the House of Representatives on March 10, 1796, said: "If the treaty-making power is not limited by existing laws, or if it repeals laws that clash with it, or if the Legislature is obliged to repeal the laws so clashing, then the legislative power in fact resides in the President and Senate, and they can, by employing an Indian tribe, pass any law under the color of treaty." Dr. Ernest Meier, Professor of Law at Halle, Leipzig, 1874, referred to by Wharton as "a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no writer in our own tongue," declared:[50] "A treaty cannot invade the constitutional prerogatives of the legislature. Congress has under the Constitution the right to lay taxes and imports, as well as to regulate foreign trade, but the President and Senate, if the 'treaty-making power' be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system * * * The Constitution gives Congress the right of declaring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war * * * Congress would cease to be the law-making power as is prescribed by the Constitution; the law-making power would be the President and the Senate."

(50) See Wharton, International Law Digest, § 131a.

The true principle of construction is thus stated by Cooley:[51] "Effect is to be given, if possible, to the whole instrument, and to every section and clause * * *. This rule is applicable with special force to written constitutions * * *. One part is not allowed to defeat another, if by any reasonable construction the two can be made to stand together." It is true, as we have seen, that some authors, Von Holst and Halleck, for example, argue that the treaty-power is the department which must be unlimited and uncurbed by any other provisions of the Constitution. To the author this view does not seem sound, particularly since foreign nations are presumed to know the limitations on the treaty-power which are to be found in our Constitution, and which, as pointed out shortly before, make, to him, a clear case in favor of the argument that the legislature is neither legally nor morally bound by certain treaty stipulations enacted by the President and Senate. He believes that an equally good case could be built up to demonstrate that the United States is not internationally bound in such a case, despite the views of some very eminent authorities.

The power to *grant* appropriations must include the *right* to examine proposed appropriations; the minute a legal or moral obligation is placed upon Congress to make or not to make such an appropriation the right to *freely* examine, to use discretion, is either limited or utterly destroyed. H. St. George Tucker, one of the best known authorities on treaty making, wrote in the Central Law Journal of August 1, 1919: "If the power given to Congress to declare war means anything, it means that the power must be exercised by the free, independent and untrammelled judgment of the

(51) Constitutional Limitations, 7th Edition, 91.

representatives of the people, or it means nothing. To be morally bound is as effective as is being legally bound * * *. In other words, if under this theory, Congress must declare war, it is clear that it has no independent action * * *. The treaty power may make a treaty (a contract) agreeing to declare war, but it is valueless without the act of Congress to execute it—and immorality cannot be imputed to Congress for declining to do what their best judgment does not approve.

Conclusion.—I have endeavored to prove the following points: (1) With a few exceptions (such as depriving a state of its republican form of government) treaties may be made dealing with any subject commonly made the object of agreements between sovereign states; (2) that in some cases treaties require legislative action before they can be municipally binding; (3) there is no legal obligation upon the Congress to pass the needed legislation; (4) nor is there a moral obligation upon Congress to do so, since: (a) it is recognized in international law that a nation's power to make treaties may be limited by its constitution; (b) foreign nations are presumed to know the provisions touching in any way, express or implied, the treaty-power of states with which they are dealing; (c) limitations which require congressional action are to be found in the American Constitution. I do not mean to say that Congress should lightly refuse to pass an appropriation called for by a treaty duly ratified. If the treaty-power under this view is held to be too limited the remedy, as Tucker points out,[52] is not by overriding our Constitution, whose limitations foreign nations should know, but by constitutional amendment.

NOEL SARGENT.

Minneapolis, Minn.

(52) Limitations on the Treaty-Making Power, Ch. 13.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.

ELDRIDGE v. ENDICOTT, JOHNSON & CO et al.

177 N. Y. Supp. 863.

Supreme Court, Appellate Division, Third Department. September 18, 1919.

Where a servant's neck was slightly cut while being shaved at a barber shop, and on the following day, while working in a tannery handling hides, symptoms of anthrax first appeared his death from the disease was due to accidental injury "arising in the course of his employment."

Woodward and Henry T. Kellogg, JJ., dissenting.

LYON, J. The commission has found that on November 16, 1915, while being shaved at a public barber shop, the neck of William Eldridge was slightly cut with a razor; that on the following day, when the symptoms of anthrax first appeared, he was working in the tannery of his employers, Endicott, Johnson & Co., handling hides; that the reasonable inference is that he contracted anthrax in the course of his employment; and that he died as a result of said anthrax on November 20th. The commission has also found that the contracting of anthrax, consisting of the bite of the bacillus of anthrax, was an accidental injury within the meaning of the Compensation Law, and that said injury arose out of and in the course of his employment. Upon the hearing before the deputy commissioner, the only question litigated was whether the injury was an accidental injury; the attorney for the insurance company stating: "It is supposed that he got the anthrax germ at his work." In the opinion written in the case, the commissioner says:

"I think it is fair to assume that he contracted anthrax in the course of his employment, and the question is: Can his death, under the circumstances, be attributed to an accidental injury arising out of and in the course of his employment?"

The opinion is based upon the case of Bacon v. United States Mutual Accident Association, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748; two judges dissenting. As was said by Justice Cochrane in the case of Hiers v. Hull & Co., 178 App. Div. 350, 164 N. Y. Supp. 767, commenting upon the Bacon Case:

"That case was decided with reference to the particular provision and phraseology of the policy then under consideration, and it is quite clear that it constitutes no precedent under the statute we are now called upon to apply."

In the case of Hiers v. Hull & Co., supra, it was held that an employe, injured while handling diseased hides became infected with anthrax germs through an abrasion in his hands previously sustained, met with an accidental injury within the meaning of the Compensation Law.

In Hart v. Wilson, 186 App. Div. 926, 172 N. Y. Supp. 896 (affirmed 227 N. Y. ——, 124 N. E. ——), in which Hart died of tetanus, the commission found that the contraction of tetanus, consisted of the bite of the bacillus of tetanus, which was undoubtedly in the wool, was an accidental injury within the meaning of the Compensation Law. No opinion was written in this court or in the Court of Appeals in this case. This case makes it unnecessary to discuss the case of Richardson v. Greenberg, 188 App. Div. 248, 176 N. Y. Supp. 651.

In Higgins v. Campbell & Harrison, Limited, 6 W. C. C. 1, a workman who had a pimple on his neck was employed in a wool-combing factory. It was his duty to bring bales of wool to the factory and take them to the machine to be washed. In doing this he had to pass some bales of Persian wool, and in the course of his employment he contracted anthrax. Held that he was entitled to compensation.

In Brintons, Limited, v. Turvey, 7 W. C. C. 1, the applicant's husband was employed in the appellant's factory as a wool sorter. He became infected with anthrax from wool which it was his business to sort. An operation became necessary and resulted in his death. Held, by the House of Lords, that the contraction of anthrax was an accident.

In Lewis v. Ocean Accident & Guarantee Corp., 224 N. Y. 18, 120 N. E. 56, there was little doubt that the germ causing the death came from an infected pimple. It was held that if the pimple had been punctured by some instrument, and the result of the puncture was an infection of the tissues, then there was an accident, and the defendant was liable.

In Horrigan v. Post Standard Co., 224 N. Y. 620, 121 N. E. 872, where decedent cut his finger at home, and, while engaged in cleaning a urinal, put his injured hand into the water, producing an infection which caused his death, it was held that his death was the result of an accident, and that the applicant was entitled to compensation.

In Plass v. Central New England Railway Co., 169 App. Div. 826, 155 N. Y. Supp. 854, Plass was engaged in cutting weeds along the railway right of way, and came in contact with poison ivy, which resulted in his sickness, reducing his power of resistance, and while in bed he contracted bronchitis, which developed œdema of the lungs, and he died quite suddenly, it was held that his widow was entitled to compensation.

The commission has found that this claim falls within the principle of Horrigan v. Post Standard Co., and of Hiers v. Hull & Co.

The award should be affirmed. All concur, except WOODWARD and HENRY T. KELLOGG, JJ., who dissent.

NOTE—*Injury Out of and in Course of Employment.*—The instant case is stated to have been deemed by New York Industrial Commission to be within the principle of two prior decisions in New York courts. One of these, Harrigan v. Post Standard Co., 224 N. Y. 18, 120 N. E. 56, was where death of insured was caused by infection followed after an inflamed pimple had been punctured by a physician. That death was due to inflammation of the brain, produced by a germ. It was left to the court to say if such infection was an accident. It was ruled there was some testimony to show the pimple had been punctured by some instrument causing infection. To apply that ruling to the instant case one would have to say (it being conceded that there was no question of its taking place in the course of employment) that there was some proof whereby it might be inferred that the razor wherewith deceased was shaved carried infection.

In the other case, Hiers v. Hull & Co., 178 App. Div., 350, 164 N. Y. Supp. 767, the facts seem closer even to the accident than in the instant or the other case. On the day of the injury claimant was handling dirty and diseased hides and anthrax germs were communicated to him through an abrasion in his hand and thus infection resulted. That looks simpler, unless it should be thought that claimant should not have handled hides with his hands in bad condition.

The New York cases seem not to put as much stress on the phrase "arising out of and in the course of" employment as other cases do.

Thus, it was held, that though an accident occurred to a workman before his working time began in the morning, yet this was in the course of employment where he was complying with his duty as foreman getting his materials together for the day's work. Mueller Constr. Co. v. Industrial Board, 283 Ill. 148, 118 N. E. 1028. The court, in speaking of the conditions for recovery, said: "It is not sufficient that the accident occur in the course of employment, but the causative danger must also arise out of it. The words 'arising out of' refer to the origin or cause of the

accident, and are descriptive of its character, while the words 'in the course of' refer to the time, place and circumstances under which the accident takes place." All of the conditions were held fulfilled in such a case.

In Zabriskie v. Erie R. Co., 86 N. J. L. 266, 92 Atl. 385, L. R. A. 1916A 315, a claimant was hurt when he was crossing a street to obtain facilities needed by claimant in his work and this was held to fall within the course of employment.

In Milliken's Case, 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A 337, 4 N. C. C. A. 512, it was held that a teamster's death from pneumonia brought on by his falling in a swamp and lying there all night, after having suffered a loss of memory, when all of this happened to him in driving or trying to drive his team, may have arisen out of the employment, but was not in the course of his employment. It was said: "The difficulty in the case arises from the provision that the personal injury must be one 'arising out of' as well as one 'in the course of employment.'"

There is refinement in distinction in Ward v. Industrial Acci. Comn., 175 Cal. 42, 164 Pac. 1123, L. R. A. 1918A 233, wherein it was held that where an injury accrued from accidental discharge, from a jolt in a wagon, of a gun belonging to a fellow employe, which was on the wagon by employer's consent, so the employe might hunt after working hours, it was within Compensation Act, as arising out of employment.

But a city teamster directed by superintendent of a wood yard to move the household goods of an indigent person, and injured while so doing, was injured in course of employment where the general purpose of the wood yard was in giving relief to indigent persons. Oakland v. Industrial Acc. Comm., Cal. App., 170 Pac. 430.

And a railroad employe injured on his way to assist in removal of the wreck of a train is entitled to an award where by the terms of his employment he was to be considered on duty until he reported at his home station when his work was completed. Re Maroney, Ind. App., 118 N. E. 134.

Massachusetts is again seen to apply the words of the statute very strictly where an employe was injured in attempting to crawl over tubs to open windows, which had been nailed down by the employer, back of such tubs. It was said he must be held to have worked in the dye house as furnished for use by his employer. Borin's Case, 227 Mass. 452, 116 N. E. 817, L. R. A. 1918A 217.

Howsoever, it may be thought that great liberality is to be used in construing Workmen's Compensation Acts, yet the courts are far from applying this liberality, however definitely they may trace the origin of rulings to English law, upon which our statutes so greatly have been bottomed and whose very phraseology they so greatly employ. C.

HUMOR OF THE LAW.

SOUTHERN POLITICS.

Lay the jest about the julep on the camphor balls at last,
For the miracle has happened and the olden days are past.
That which made Milwaukee famous does not foam in Tennessee
And the lid on old Missouri is as tight locked as can be;
For the eggnog now is noggless and the rye has gone awry,
And the punch bowl holds carnations and the South "By Gawd, Sir's dry."

By the still side on the hill side in Kentucky all is still,
For the old damp refreshments must be dipped up from the rill.
N'th C'lina's stately ruler gives his "Cola" glass a shove
And discusses local option with the South C'lina Gov.
For the mint beds make a pasture and the corkscrew hangeth high,
And the cocktail glass is dusty and the South, "By Gawd, Sir's dry."

All the night caps now have tassels and are worn upon the head,
Not the nightcaps that were taken when nobody went to bed;
When the Colonel and the Major and the Gen'l and the Judge
Meet to have a little nip to give their appetites an edge,
Now each can walk a chalk-line when the stars are in the sky
For the fizz glass now is fizzless and the South, "By Gawd, Sir's dry."

Though she still has pretty women and her horses still are fast,
"Old Kentucky's" crowning glory is a memory of the past;
Now the partisans of "straight goods" and the "rectified" speak well,
For what's the use of scrapping when the business goes to h—?
In those lovely tassled cornfields all the crows are living high
Each distillery's a graveyard for, the South, "By Gawd, Sir's dry."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Attorney and Client**—Misleading Court.—Where an attorney, for the purpose of securing delay, procured his client to make an affidavit for change of venue on account of prejudice, naming nine sitting judges in the circuit court, he is guilty of improper conduct, which may of itself be sufficient grounds for disbarment, where the judges whose names were mentioned knew nothing of the case involved.—People v. Martin, Ill., 124 N. E. 340.

2. **Bankruptcy**—Ancillary Receiver. — The rights of an ancillary receiver are those of an execution creditor, and the priority rights of such creditors as against claims for superior liens must be determined by the laws of the state where the execution is levied.—Hoyt v. Zibell, U. S. C. C. A., 259 Fed. 186.

3.——Discharge.—For the purpose of petitioning for reopening, under Bankruptcy Act, July 1, 1898, § 2, cl. 8, a closed bankruptcy estate, as having been closed before being fully administered, persons who were creditors of the estate before bankrupt's discharge are still such.—In re Levy, U. S. D. C., 259 Fed. 314.

4.——Jurisdiction.—The federal bankruptcy court had power by summary order to compel the state court receiver of an insolvent partnership to turn over money in his possession to the bankruptcy court, to await its action on the question of compensation, fees and disbursements of the receiver.—In re Diamond's Estate, U. S. C. C. A., 259 Fed. 70.

5.——Plenary Suit.—The reopening of the closed bankrupt estate being limited to purposes of administration, as expressly declared by the judge on denial of petition to vacate the reopening order, the power of the referee is confined to such procedure as will enable the trustee to collect and distribute unadministered assets, which includes authority to proceed by plenary suit, but not by summary order on the bankrupt.—In re Levy, U. S. D. C., 259 Fed. 316.

6.——Proof of Claims.—A creditor, who holds a note of a bankrupt firm upon which a partner has, as joint maker, surety, or indorser, made himself individually liable, is entitled to prove his claim against both the partnership and individual estate.—Bank of Reidsville v. Burton, U. S. C. C. A., 259 Fed. 218.

7.——Waiver.—Where, after two judgment creditors levied execution, the debtor filed a petition and was adjudicated a bankrupt and proceedings on writs of execution were stayed, held that, though the bankrupt had waived in the judgments his right to personal exemptions, it was a contempt of court for the judgment creditors to proceed under the writs of executions to sell property set aside to the bankrupt on his claim of exemptions, the restraining order not having been modified so as to allow such proceedings; and this is so even though the creditors were entitled to reach such property.—In re Braun, U. S. D. C., 259 Fed. 309.

8. **Banks and Banking**—Set-Off.—A bank may set off against a deposit standing in a wife's name a debt due it from her husband, where the deposit was of the husband's funds, and was made in the wife's name to defraud creditors.—Moore v. Greenville Banking & Trust Co., N. C., 100 S. E. 269.

9. **Bills and Notes**—Exchange.—A note payable at the option of the holder at a banking house in Denver or at a bank in New York does not entitle the holder, demanding payment at Denver, to add to the principal and interest "handling charges to New York," or the cost of New York exchange.—H. E. Wright & Co. v. Douglas, Wyo., 183 Pac. 786.

10. **Boundaries**—Courses and Distances.—Departure from courses and distances required to yield to a call for an extended natural object should not be greater than is reasonably necessary, and, the distance called for being exhausted, a slight and immaterial variation from the prescribed course, whereby the nearest point in the natural object can be reached, should be made, rather than to follow the course precisely and reach the natural object at a much greater distance.—Rowe v. Kidd, U. S. C. C. A., 259 Fed. 127.

11. **Brokers**—Commission.—A broker cannot recover commission on sale of a farm, without introducing evidence that he was the main or moving cause of inducing the customer, who purchased, to meet with the owner and negotiate with him.—Thomas v. Wyckoff, Iowa, 174 N. W. 26.

12. **Carriers of Goods**—Delay.—Where a carrier failed to deliver cotton to the consignee, but turned it over to a compress company, retaining such company's ticket, it was liable as insurer on loss of the cotton by fire.—Wichita Falls & N. W. Ry. Co. v. J. J. Brown Co., Okla., 183 Pac. 889.

13.——Form of Shipment.—A shipper of goods has the right to refrain from assembling its ultimate product, or to disassemble the same, for shipment in any way that will make the shipment take a lower traffic rate than if the articles were in final form.—Lakewood Engineering Co. v. New York Cent. R. Co., U. S. C. C. A., 259 Fed. 61.

14. **Carriers of Passengers**—Transfer. — A passenger on a street car who was required to transfer to another car to reach his ultimate destination is still a passenger and entitled to care as such during the necessary acts of such transfer.—Feldman v. Chicago Rys. Co., Ill., 124 N. E. 334.

15. **Certiorari** — Quo Warranto. — Certiorari, and not quo warranto, against a county board of elections is the appropriate remedy for a district election officer to remove an alleged illegal resolution of the board impeding him in the performance of his public duty.—Hartley v. County Board of Elections of Passaic County, N. J., 107 Atl. 817.

16. **Chattel Mortgages**—Equity.—The court of chancery will not tolerate an evasion of the statutes requiring a record of chattel mortgages, and will look to the real transaction between the parties, notwithstanding the terms of any written instruments.—Rapoport v. Rapoport Express Co., N. J., 107 Atl. 822.

17. **Commerce**—Employe. — A flagman employed by defendant railroad at a street crossing where all its tracks and those of another company, which reimbursed defendant for one-third of the cost of maintaining flagman, were used indiscriminately for interstate and intrastate commerce, and killed by interstate train of the other company in the course of his employment, was engaged in interstate commerce, within the federal Employers' Liability Act.—Chicago & A. R. Co. v. Industrial Commission, Ill., 124 N. E. 344.

18.——Federal Employers' Liability Act. — A railroad employe in charge of a signal tower and water tanks, who was injured while operating a pump for pumping water from a well into the tanks for supplying water to the locomotives of both interstate and intrastate trains, held engaged in work so closely related to interstate commerce as to be within Employers' Liability Act, § 1 (Comp. St., § 8657).—Erie R. Co. v. Collins, U. S. C. C. A., 259 Fed. 172.

19.——Federal Employers' Liability Act.—The employe of a railroad, whose work was to supply engines with sand, and who, after having carried ashes from the drying stove to the ash pit, lost his leg when struck by a locomotive on a foggy night, held injured in interstate commerce, so as to entitle him to maintain action under federal Employers' Liability Act.—Erie R. Co. v. Szary, U. S. C. C. A., 259 Fed. 178.

20. **Conspiracy**—Relationship to Offense.—To create such relation, between a conspiracy and the substantive offense which was its purpose, as ought to prevent a double prosecution, there must be a complete identity between those acts which are the overt acts essential to make the conspiracy punishable and those acts which are necessary to make out the substantive offense.—Laughter v. United States, U. S. C. C. A., 259 Fed. 94.

21. **Contempt**—Mitigating Punishment.—That there was no moral intent to defy the court or its order is no defense in a proceeding for contempt in violating a restraining order of the court, but it will serve to mitigate the punishment.—In re Braun, U. S. D. C., 259 Fed. 309.

22. **Contracts**—Duress.—"Duress" is a condition existing where one by unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will, but mere annoyance or vexation will not constitute it; there must be such compulsion affecting the mind as shows the act not voluntary.—Harris v. Flack, Ill., 124 N. E. 377.

23.——Illegality.—A party may be relieved from a contract containing illegal provisions, but if he accepts the contract and retains the consideration he has a right to be relieved only from the amount of damage caused by the illegal provisions.—The Ijselhaven, U. S. D. C., 259 Fed. 306.

24.——Pleading.—Plaintiff, suing in one count for money advanced under a contract and in another count for damages for breach of contract, by accepting amount advanced with interest in full satisfaction of demand based on cause of action of first count exercised his right of rescission, and terminated the contract, and cannot thereafter recover on second count for breach thereof.—House v. Piercy, Cal., 183 Pac. 807.

25.——Prior Negotiations.—All prior negotiations, or so much as the parties see fit, are merged in the written contract.—Bassett v. Breen, Me., 107 Atl. 832.

26.——Survivorship.—At common law the right of action on a contract made with several persons jointly passes on the death of each to the surviving co-obligees.—Pollock v. House & Hermann, W. Va., 100 S. E. 275.

27. **Copyright**—Abandonment. — The public performance of a musical composition is not an abandonment of the composition to the public, which will invalidate a subsequent copyright.—McCarthy & Fischer v. White, U. S. D. C., 259 Fed. 364.

28. **Corporations** — Breach of Contract. — Where the promisee in a corporation's contract can enforce full satisfaction of a judgment obtained in an action against the corporation or the breach of the contract, the directors, if liable at all for causing breach of contract, would not be personally liable.—Lukach v. Blair, N. Y., 178 N. Y. Sup. 8.

29.——Conspiracy.—If a manager of a mining company, the scene of whose operations were in a state far distant from that in which the stockholders and directors resided, rendered no faithful service to the company and joined with stockholders and directors, all of whom were maneuvering to get the property away from the company for their own benefit, there can be no recovery for services after the time the agent joined in the conspiracy.—Munro v. Smith, U. S. C. C. A., 259 Fed. 1.

30.——Foreign Corporation.—The mere solicitation of business by agents of a foreign corporation is not such a "doing business" within the state as to subject the company to the jurisdiction of the courts of the state in which the business is solicited, though the recent tendency seems to be to consider agents engaged in soliciting business as agents of the company for service of process.—Pembleton v. Illinois Commercial Men's Ass'n, Ill., 124 N. E. 355.

31.——Gift to Director.—Gifts, gratuities, or bribes, given to a director to influence his official action, must be accounted for by him and surrendered to the company.—Keystone Guard v. Beaman, Pa., 107 Atl. 835.

32.——Secret Profits. — The secret profit realized by a director from an undertaking to deliver the corporate control of his company inures to the corporation.—Keely v. Black, N. J., 107 Atl. 825.

33. **Courts**—Stare Decisis.—The rule of stare decisis is especially applicable to decisions on matters of procedure and practice.—Horton v. Wright, Barrett & Stilwell Co., N. D., 174 N. W. 67.

34. **Covenants**—Restrictions.—In the interpretation of contracts imposing limitations and restrictions upon the use of property, doubts are to be resolved against the limitation or restriction, but, where the intention is clearly manifested by the language of the contract in view of the situation and circumstances, the restriction is uniformly enforced.—Wolf v. Schwill, Ill., 124 N. E. 389.

35. **Criminal Law**—Asportation. — Where, after defendant had first stolen the potatoes, larceny of which is charged, he carried them away into another county for sale, his possession was a larceny in each county into which he carried the goods, every moment's continuation of the trespass and felony amounting in legal contemplation to a new caption and asportation, and he could be prosecuted in the second county, into which he carried the goods, as for a larceny committed therein, apart from Pen. Code, § 786.—People v. Mills Sing, Cal., 183 Pac. 865.

36.——Accused as Witness.—The fact that defendants did not see fit to take the stand and deny the charges made against them could not be allowed to raise in the minds of the jury any inference of guilt.—Mayer v. United States, U. S. C. C. A., 259 Fed. 216.

37.——Distinct Offenses.—Testimony relating to separate and distinct offenses is competent for the purpose of showing criminal intent.—People v. Bransfield, Ill., 124 N. E. 365.

38.——Intent.—Intent being part of the offense, evidence of other acts or words of defendant than those charged are admissible to show his attitude of mind and intent or purpose.—Schulze v. United States, U. S. C. C. A., 259 Fed. 189.

39.——Positive Testimony.—Ordinarily positive testimony is of more value than negative testimony, but circumstances may be shown which make such negative testimony strong affirmative evidence.—State v. Barino, Del., 107 Atl. 833.

40.——Scienter.—Proof of commission of other like offenses to show the scienter is generally competent when the crimes are so connected or associated that this evidence will throw light upon that question.—State v. Stancill, N. C., 100 S. E. 241.

41.——Verdict.—A verdict in a criminal case may rest upon rightful inference, as well as upon direct testimony.—Robilio v. United States, U. S. C. C. A., 259 Fed. 101.

42. **Customs and Usages**—Evidence.—In action for contract price of 1,000 hides, sold under contracts specifying delivery of two grades at different prices, but not specifying the proportion of each buyer's offer to prove a trade custom, requiring a fixed proportion as between the two grades, if not in form disclosing a trade custom, was properly rejected, as it was first essential that buyer offer proof to establish such custom.—Krehl v. Mosser, Pa., 107 Atl. 834.

43. **Damages**—Detention of Money.—If defendant pretended to be plaintiff's guardian, and held possession of her money in such pretended capacity, interest would only be recoverable as damages for detention of the money.—Hopkins v. Erskine, Me., 107 Atl. 829.

44. **Death**—Presumption Against.—There is a presumption, when persons are proved to have been living, that the same state of things as to their life continues, at least for a relatively short space of time.—Detroit United Ry. v. Weintrobe, U. S. C. C. A., 259 Fed. 64.

45. **Equity**—Cross-Bill.—Where no claim has been made for cross-relief, plaintiff has an absolute right to dismiss his bill without prejudice at any time before the case is ripe for decision, if not later, and the expense incurred by defendant, in preparing for trial, and the resulting delay, do not alone constitute good cause for refusing such dismissal.—Lindley v. Denver, U. S. C. C. A., 259 Fed. 83.

46.——Jurisdiction.—Where court of equity assumes jurisdiction of controversy on some ground other than accounting involved, and where accounting is necessary for full settlement of controversy, it will generally proceed to decree it and settle whole controversy, even to extent of settling matters of purely legal cognizance.—Probst v. Bearman, Okla., 183 Pac. 886.

47. **Evidence**—Contradicting Writing. — Generally parol evidence cannot be received to contradict or vary the terms of a contract, in absence of fraud.—Bassett v. Breen, Me., 107 Atl. 832.

48. **Executors and Administrators**—Continuing Business.—An executrix, who under the will was authorized to continue testator's business as long as it was deemed for the best interests of the estate, was accountable only for good faith in the exercise of the discretion vested in her, and was not responsible for errors of judgment.—In re Friedlander, N. Y., 178 N. Y. Sup. 50.

49. **Gifts**—Possession.—The mere fact that the donee of personalty allows possession of the property to remain with the donor will not necessarily defeat the gift.—Whatley v. Mitchell, Ga., 100 S. E. 229.

50. **Guaranty**—Privity.—There is no privity or mutuality or joint liability between the principal debtor and guarantors who by independent contract have guaranteed payment of debt.—Withers v. Bousfield, Cal., 183 Pac. 855.

51. **Highways**—Abutting Owner.—At common law the abutting owner owned soil to the center of highway.—Dyer v. Mudgett, Me., 107 Atl. 831.

52. **Husband and Wife**—Marital Rights.—Husband and wife each acquire certain marital rights in the other's property, which are protected against conveyances or other dispositions thereof made with intent to defeat such rights.—Deck v. Huenkemeir, Ill., 124 N. E. 381.

53. **Injunction**—Trade Secrets.—Equity will restrain a party from making disclosures of secrets communicated to him in a confidential employment, whether the secrets be trade secrets, or secrets of title, or any other secrets of the party important to his interest.—Eastman Kodak Co. v. Warren, N. Y., 178 N. Y. Sup. 14.

54.——Unauthorized Prosecutions.—A court of equity may restrain prosecuting officers, either of a state or of the federal government, to prevent a series of unauthorized prosecutions, which may prove ruinous to persons either in their property or business.—Jacob Hoffmann Brewing Co. v. McElligott, U. S. D. C., 259 Fed. 321.

55.——Vacating.—A motion to vacate or modify a restraining order is one which the court will always entertain.—In re Levy, U. S. D. C., 259 Fed. 314.

56. **Insurance**—Construction of Contract.—An existing doubt as to the construction of the different parts of a policy of insurance must be resolved in favor of the insured.—Carter v. Metropolitan Life Ins. Co., Pa., 107 Atl. 847.

57. **Joint Tenancy** — Unlawful Detainer. — Though a joint tenant or tenant in common may maintain an action of forcible entry and detainer against a cotenant who has ejected him, his right to restitution is restricted to his right of reinstatement to the common possession only.—Noble v. Manatt, Cal., 183 Pac. 823.

58. **Judgment**—Res Judicata.—To make a matter res adjudicata the judgment must proceed from a court having jurisdiction, be between the same parties and for the same purpose.—Deke v. Huenkemeier, Ill., 124 N. E. 381.

59. **Landlord and Tenant**—Executory Lease. —A covenant that a lessee will do one thing or will do another thing may impose a binding obligation, although in the alternative, and does not necessarily import any fatally optional or unilateral character, and is not inappropriate to lease which grants a vested interest; but a lease which does not take effect unless the lessee does a certain act is only executory, and is inoperative if the condition is not performed.—Hopkins v. Zeigler, U. S. C. C. A., 259 Fed. 43.

60.——Repairs.—In the absence of a covenant or agreement by the landlord to repair or maintain the leased premises in safe and suitable condition for the occupancy and use of the tenant, he is not bound to do so.—Divines v. Dickinson, Iowa, 174 N. W. 8.

61. **Libel and Slander**—Innuendo.—Unless an article published by defendant in its newspaper was of such a nature that, in view of extrinsic facts alleged and proved, it conveyed to readers charges of dishonesty and financial irresponsibility on the part of plaintiffs, the innuendo would not give it such sinister significance.—Mahana v. Echo Pub. Co., Cal., 183 Pac. 800.

62. **Marshaling Assets and Securities**—Alternative Remedy.—Where a creditor has a lien on two securities with which to make his debt, and another party has an interest in one of them, the latter has a right to compel the creditor first to exhaust the security in which he alone is interested.—Metzger v. Emmel, Ill., 124 N. E. 360.

63. **Master and Servant**—Safe Place to Work. —A master is not required to furnish a safe place to work, where servant is hired to assist in the repair, demolition, or alteration of a building damaged by fire, or where he is engaged in making a dangerous place safe.—Searles v. Boorse, Pa., 107 Atl. 838.

64.——Warning.—Ordinarily it is not negligent for a switching engine in a railroad yard not to give warning by bell or whistle to employes familiar with the operation of the yard. —Lehigh Valley R. Co. v. Scanlon, U. S. C. C. A., 259 Fed. 137.

65. **Mines and Minerals**—Location.—The law permits location of mining claims in the names of persons not present, who may act through an attorney in fact, and when so made all the right or title acquired by the locators may be disposed of.—United States v. California Midway Oil Co., U. S. D. C., 259 Fed. 343.

66. **Navigable Waters**—Bridge.—The official approval by the government of the construction of a bridge is conclusive that the bridge was a lawful structure, though it interfered with navigation.—Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co., U. S. C. C. A., 259 Fed. 166.

67. **Negligence**—Contributory Negligence. — Plaintiff's contributory negligence does not bar his right to recover under the Employers' Liability Act, but only diminishes the amount of his damages.—Central R. Co. of New Jersey v. Sharkey, U. S. C. C. A., 259 Fed. 144.

68. **Patents**—Express Limitation.—Where a claim defines an element in terms of its form, material location, or function, thereby apparently creating an express limitation, and the limitation pertains to the inventive step, rather than to its environment, and imparts a substantial function which the patentee considered of importance, forms excluded, cannot be considered covered by the patent, under the doctrine of equivalency.—D'Arcy Spring Co. v. Marshall Ventilated Mattress Co., U. S. C. C. A., 259 Fed. 236.

69.——Inherent Right.—A patent is not inherently the grant of a right to make; it is a grant of the right to exclude others from the field.—Bird's-Eye Veneer Co. v. Franck-Philipson & Co., U. S. C. C. A., 259 Fed. 266.

70.——Invention.—Invention cannot be made to depend upon the length of the advancing step in the art; but if the step be an advance, and the means by which the advance is made are new and beyond the conception of a mechanic trained in the art, invention must be recognized.—Superior Mach. Tool Co. v. Cincinnati Lathe & Tool Co., U. S. C. C. A., 259 Fed. 273.

71.——Mechanical Equivalency.—The patent law does not permit an inventor to arrange the various parts to cover the entire idea, and thus exclude mechanical equivalency and the results accomplished.—Adt v. E. Kirstein Sons Co., U. S. D. C., 259 Fed. 277.

72.——Monopoly.—The invention of a new and useful product or article of manufacture may have a patent covering it and giving a monopoly upon it, regardless of great variations in the methods of making.—Dunn Wire-Cut Lug Brick Co. v. Toronto Fire Clay Co., U. S. C. C. A., 259 Fed. 258.

73. **Perjury**—Materiality.—The materiality of a purjured statement may be alleged in an indictment, either by an allegation of materiality or by pleading facts which show materiality.—Berry v. United States, U. S. C. C. A., 259 Fed. 203.

74. **Principal and Agent**—Evidence.—When authority is deduced from recognition of certain acts, it must be limited to the presumption of other acts of the same general kind, and cannot be extended to acts of a wholly different nature. —Post v. City and County Bank, Cal., 183 Pac. 802.

75. **Railroads**—Federal Control. — Liabilities due to operation of railroad by the agencies having possession by virtue of the acts creating and authorizing federal control are not those of the railroad company, and suit thereon may not be brought against it and prosecuted to judgment; but a claimant is limited to right of action against the federal control agency and to such sources of payment as are provided by the Federal Control Act.—Haubert v. Baltimore & O. R. Co., U. S. C. C. A., 259 Fed. 361.

76.——Trespasser.—A railroad company is not liable for injury to a trespasser on its tracks, unless its employes knew, or were chargeable with notice, that he was in danger, and nevertheless proceeded wantonly or with reckless indifference.—Cronopolous v. Pennsylvania Co., U. S. C. C. A., 259 Fed. 210.

77. **Sales**—Cash.—In case of a cash sale, where delivery and payment are concurrent conditions, whether or not the seller has waived the condition of payment is a question of intention.—People v. Mills Sing, Cal., 183 Pac. 865.

78.——Conditional Sale.—Although a chattel mortgage in Michigan is invalid as against certain creditors, unless recorded, a conditional contract of sale, which reserves title to the vendor, is valid at the suit of the vendor, even as against similar creditors.—Smith v. Carukin, U. S. C. C. A., 259 Fed. 51.

79. **Specific Performance**—Consideration. — Inadequate consideration is not of itself sufficient ground for refusing specific performance of a contract to sell land, unless so gross as to shock the conscience.—Scott v. Habinck, Iowa, 174 N. W. 1.

80. **Vendor and Purchaser**—Forfeiture. — Right of forfeiture for failure to make payment when due may be waived by vendor's express agreement or unequivocal acts or demeanor.—Andrews v. Karl, Cal., 183 Pac. 838.

81.——Quitclaim Deed.—One can be a bona fide purchaser under a quitclaim deed, as well as if a grantee under a warranty deed.—Tucker v. Leonard, Okla., 183 Pac. 907.

82. **Wills**—Ademption. — Common-law rule that a sale by testator, after making his will, of land or personal property thereby devised or bequeathed, revoked devise or worked ademption of legacy, though not in force where legatee is an heir of testator, since enactment of Ky. St., § 2068, is applicable where devisees are not heirs.—McBrayer's Adm'rs v. Yates, Ky., 214 S. W. 815.

83.——Legacy.—Whether a legacy is a charge upon real estate of a testator is always a question of his intention.—In re Kreusser, N. Y., 178 N. Y. Sup. 62.

84. **Witnesses**—Competency.—In a criminal prosecution in a federal court against a wife, her husband is not a competent witness in her behalf against the objection of the prosecution.—Adams v. United States, U. S. C. C. A., 259 Fed. 214.